SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-270

IN THE MATTER OF	
ANTHONY FERANDA	Decision
AN ATTORNEY AT LAW	

Argued: October 16, 1997

Decided: February 17, 1998

William J. Gold and Michael J. Stanton appeared on behalf of the District XIII Ethics Committee.

Respondent appeared pro se.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board based on a recommendation for discipline filed by the District XIII Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1969. He maintains a law office in Warren, New Jersey. He has no prior ethics history.

The complaint alleged violations of RPC 1.8(conflict of interest); RPC 1.15(failure to safeguard client funds); and RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation).

* * *

In addition to his law degree, respondent obtained an L.L.M. in taxation from New York University and is a certified public accountant. He also obtained a degree in business administration from Pace University. Respondent maintains a separate office for his accounting practice in Scotch Plains, New Jersey.

Much of this matter centers around competing claims of whether respondent represented grievant as an accountant or as an attorney or both.

* * *

In 1984 John Thomas Butler ("grievant") retained respondent to advise him on tax matters related to a rental property he owned in Middletown, New Jersey. In 1986 grievant again sought respondent's advice, this time regarding capital gains taxes. Grievant wished to dispose of his rental property in Middletown before the end of the 1986 calendar year in order to delay the consequences of recent changes in the IRS tax code. At the DEC hearing, grievant testified as follows:

> Well, I went to Mr. Feranda because he was a tax attorney. I have two cousins that are C.P.A.s that could have done taxes. And, in fact, I had left a taxpayer service called Tax City in Brooklyn, New York where I had gone three or fours years prior to that. So I went

to Mr. Feranda because of the dual coverage.

Grievant further testified that, when he met respondent at his Scotch Plains office, both CPA and attorney "designations" adorned his office walls, confirming to grievant that respondent held himself out as a tax attorney. Grievant and respondent never signed a retainer agreement. According to grievant, he usually paid respondent in cash, as needed.

* * *

Grievant testified that, at the 1986 meeting at respondent's office, respondent suggested that grievant consider an "IRS code swap," referring to a transaction under §1031 of the Internal Revenue Service code that allowed the deferral of taxes on transactions that were essentially a trade between owners of like property. Respondent told grievant that he knew an individual, Patrick Reynolds, who owned properties in Hoboken that could be swapped for grievant's Middletown property. Respondent called Reynolds that day, while grievant was in his office, and arranged a meeting between grievant and Reynolds for the following day. At that meeting, grievant selected for the "swap" two condominiums owned by Reynolds.

Grievant put the Middletown property up for sale. Within weeks, he found buyers, the Ketchows. Grievant then retained a

real estate attorney, Barry Siegel, to represent him in the sale of the Middletown property. Siegel and the Ketchows' attorney both worked on the contract of sale.

The closing was held in December 1986. Siegel did not attend the closing, sending in his place another attorney from his office, Donna Kreisbuch. Respondent was present, allegedly at grievant's request, to allay the Ketchows' fears that their involvement in an IRS code "swap" might subject them to the IRS's scrutiny. Respondent explained the transaction to the Ketchows, who apparently were satisfied with the explanation. At the end of the closing, respondent requested that a $125,000 check, representing the proceeds due to grievant from the Middletown property, be issued to Reynolds, the other party in the "swap." That was done. In addition, Kreisbuch wrote a check to respondent for $25,000. The source of those funds is unknown. At the DEC hearing, grievant testified as follows about the checks:

> Question: Okay. Do you remember what the balance of the sale proceeds was after paying off the mortgage and the closing costs?
>
> Answer: It was arranged [sic] between 150 to 155,000. It was in that range.
>
> Question: And based on your knowledge, what happened to the sales proceeds after the closing?
>
> Answer: At the closing the proceeds were put in the form of a check, which Mr. Feranda took

with him.

Question: Who was the check payable to?

Answer: I'm not sure. It wasn't payable to [me]. It was — in trust for something or other. I don't recall. It might appear in the court records, but I don't recall exactly. I'm not even sure I saw.

Question: Okay.

Answer: But it was at the table. And Mr. Feranda took it with him at that time, presumably to execute the rest of the swap.

Grievant understood that there would be another closing on the Hoboken properties, at which time respondent would turn over the proceeds of the Middletown closing to Reynolds, along with additional funds that grievant had yet to secure. Grievant was certain that respondent had told him that he would hold the Middletown proceeds in his trust account, pending the Hoboken closing, at which time grievant would receive deeds to the Hoboken properties.

For his part, respondent claimed that he never represented grievant as an attorney. In both his answer to the complaint and in his testimony before the DEC, respondent asserted that grievant never asked him for legal advice and, in fact, told respondent that he had an attorney, Barry Siegel. In his answer, respondent stated as follows:

> Mr. Butler specifically refused my services as an attorney at the first meeting with respondent at respondent's accounting offices in Scotch Plains, New Jersey. Mr. Butler never sought tax advice from respondent at respondent's law office or as an attorney. Respondent never acted as an attorney for either Mr. Butler or for Mr. Reynolds who had his own attorney, Robert Matoule in Hoboken, New Jersey where Mr. Reynolds had his offices.

Respondent testified that, in order for the IRS to recognize a "swap" as a non-taxable event, certain conditions had to be met. Among them, the property received by grievant had to be equal to or greater in value than the property[1] given and no one associated with grievant could take possession of the proceeds pending the completion of the "swap." In essence, the Middletown property proceeds had to immediately go to Reynolds on account of the Hoboken properties. Respondent explained further that, for that reason, he had requested that the Ketchows' attorney, Leonard Finkelstein, issue a check in the amount of $125,000, the entire proceeds due to grievant from the Middletown property, and that the check be made payable to P.A. Reynolds and Company.

As noted earlier, Kreisbuch issued a second check in the amount of $25,000. The check was made payable to respondent. Respondent maintained that Kreisbuch had told him to give $14,900 of that amount to Reynolds. Grievant stated that he had no recollection of such a statement by Kreisbuch. Likewise, did not

[1] The sale price for the Hoboken properties was substantially greater than the $139,900 that respondent turned over to Reynolds.

recall authorizing respondent to take his fee of $7,500 out of those funds. Respondent also alleged that Kreisbuch had told him to leave the balance of $2,600 in escrow, which respondent did. According to respondent, it remained in escrow until February 7, 1987, when grievant in a telephone conversation with respondent, authorized its release to Reynolds. Grievant did not remember authorizing respondent to release the remaining funds.

The day after the closing, respondent delivered the $125,000 check to Reynolds. It is not clear precisely when he delivered the additional $14,900 to Reynolds or when respondent took his fee. Grievant testified that he paid respondent $2,500 at the end of 1986 by certified check, in addition to the $7,500 fee paid out of the escrowed funds, for a total of $10,000. Grievant also recalled that respondent was to receive separate fees for the Middletown closing, the Hoboken closing and the IRS tax audit.

* * *

Unbeknownst to grievant, respondent was also representing Reynolds in tax matters throughout the time that respondent was representing grievant. In fact, respondent twice admitted[2] receiving a $2,000 "finder's fee" from Reynolds for sending grievant to him. Despite that admission, at the DEC hearing

[2] Respondent testified at a deposition taken in an underlying malpractice litigation. Relevant portions of respondent's testimony were read into the record during his cross-examination, without any objection from respondent.

respondent denied having a prior agreement with Reynolds for a finder's fee and claimed that any discussion about payment had post-dated his introduction of grievant to Reynolds. Later on, respondent denied receiving a finder's fee, claiming that the $2,000 was for other work performed for Reynolds.

Another major inconsistency surfaced in respondent's earlier testimony in the malpractice litigation. Respondent had twice admitted that he had acted as Reynolds' attorney when escrowing funds from the closing, only to deny, at the DEC hearing, having been Reynolds' attorney. Respondent also admitted that it had occurred to him that there might be a conflict in representing both grievant and Reynolds, only to backpedal in this exchange at the DEC hearing:

> Question: Did it ever occur to you at the moment that you're now stating, at the moment that you became Mr. Reynolds' attorney in this transaction, did it ever occur to you that that created a conflict of interest?
>
> Answer: Yeah. If I were in fact acting as his attorney. As I said, I used the term attorney interchangeably with the escrow agent status that was foisted on me by Donna Kreisbuch, Mr. Butler's attorney.

After the Middletown closing, grievant was anxious to close on the Hoboken properties. Respondent testified that, under §1031 of

the IRS code, grievant had until June 29, 1987 to acquire the Hoboken properties. Between the Middletown closing and June 29, 1987, events unfolded in a bizarre fashion. Beginning in January or February of that year, grievant, under the misapprehension that a closing on the Hoboken properties was imminent, set about making repairs to the properties, hoping that, by doing so, certificates of occupancy would be issued and a closing could then be held. On April 9, 1987 grievant and respondent met at respondent's office in Scotch Plains and signed grievant's 1986 income tax returns. Those returns indicated that a §1031 swap transaction was to be completed before June 29, 1987.

* * *

Shortly after grievant's 1986 tax returns were filed, grievant first learned from Siegel that "there were many liens on the property against Mr. Reynolds personally, against the property from the IRS from two or three banks. . . . And he painted a rather dim picture, because the liens well exceeded what the cost of the whole property was by several hundred thousand dollars". Grievant then contacted respondent and learned for the first time that respondent had already turned the proceeds of the Middletown closing over to Reynolds:

> I then called Mr. Feranda to find out how I could then back out of this because of all of

> these liens. It was then that I learned that he had already turned over the proceeds of the Middletown sale to Mr. Reynolds. And in fact, I was at that point broke. That was all the money I had, other than the car that I owned and the clothes that I owned.

For his part, respondent testified that he was aware that there were liens on Reynolds' corporate property for its failure to pay payroll taxes and that Reynolds was responsible for those "trust fund" taxes, along with the company. Respondent testified that he had worked with Reynolds and the IRS in an effort to clear the liens so that Reynolds could prepare financial statements for potential investors to review prior to investing in his real estate ventures. Respondent maintained, however, that he had no idea that the Hoboken properties were "loaded up with liens," blaming Siegel for any oversights concerning the liens. Respondent acknowledged that no one had authorized him to turn over the $125,000 check to Reynolds, preferring to focus on the fact that no one had instructed him not do it. When asked why he did not inquire about the status of the Hoboken properties before releasing funds to Reynolds, respondent replied, "[b]ecause I wasn't retained to do that."

Grievant immediately secured a new tax attorney, Walter Levine. Grievant and Levine met respondent and Reynolds at Siegel's office to discuss the status of the "swap." According to grievant,

> Mr. Reynolds said that that money was all gone. And that he would keep me in mind if another property came up that he could deed over to me, but that that money was gone and various construction projects. [sic] And he was rather flippant about it, so I'll never forget, you know.

There was never a closing on the Hoboken properties. Grievant never saw Reynolds or his money again.

* * *

Some time passed before the IRS took an interest in respondent's failed "swap." As grievant testified,

> Answer: For about six years following that, I was hounded by the IRS for failure to pay taxes on the proceeds of the sale of the Middletown property.
>
> And that took the form of confiscating income tax refunds that were due me, receiving at least five notices of liens against, you know, against my assets. And it finally resolved after about five to six years of involvement by Mr. Levine on my behalf with the IRS.
>
> So I do not have a clear recollection, you know, recollection of what Mr. Levine's fee schedule is, but I can tell you it exceeded $10,000 in fees I had to pay in order to have the IRS matters taken care of.

Question: Did you have to end up paying taxes on the sale proceeds to the IRS?

Answer: I had to pay taxes in the form of them confiscating my refunds for subsequent years.

Question: Did you have to – did you pay penalties, interest and that sort of thing?

Answer: Penalties, interest, the whole thing. They confiscated all of that out of refunds for subsequent years. And then my – Mr. Levine on my behalf went to them and had at least two or three meetings, plus countless letters explaining that, in fact, I had suffered a, basically a fraud and that this was a loss of a property, this wasn't the sale of a property.

And they finally settled the issue in about 1993. I finally got a check from them refunding some of the overpaid tax I had paid earlier.

[T 33-35][3]

Finally, in or about February 1988 the IRS commenced an audit of grievant's 1984, 1985 and 1986 tax returns. It was at about this time that respondent received a $2,000 payment from Reynolds.

* * *

[3] T refers to the transcript of the DEC hearing on January 22, 1997.

The DEC found that respondent violated RPC 1.15(failure to safeguard client funds), by taking his fee without grievant's knowledge or consent; RPC 1.7 and RPC 1.9 (conflict of interest), by representing both grievant and Reynolds at the same time, taking a finder's fee for the "swap" and not disclosing the dual representation to grievant. The DEC also found a violation of RPC 1.1(a) for respondent's turnover of the Middletown proceeds to Reynolds without securing deeds to the Hoboken properties or otherwise protecting grievant's funds. The DEC recommended the imposition of a three-month suspension.

* * *

Upon a de novo review of the record, the Board is satisfied that the DEC's finding that respondent's conduct was unethical was supported by clear and convincing evidence.

The threshold issue in this case was whether or not respondent had acted as grievant's attorney. Grievant was unequivocal in his testimony that he sought respondent's expertise as a tax attorney, not merely as a CPA.

Although grievant had relatives who were CPAs, he did not consult with them when he needed tax counseling in this matter. It is obvious that he retained respondent because he needed an attorney. Other than respondent's testimony, there is nothing

indicating that his role in this matter was limited to advice as a CPA.

The Board found that respondent was acting as an attorney rendering expert tax advice. There is no evidence that respondent advised grievant that he would not be representing him as a tax attorney, only that grievant did not wish respondent to perform the Middletown closing. Nothing in the record gave grievant the slightest notice that respondent was not acting as his tax attorney. At the closing, respondent allayed the Ketchows' fears of the complicated transaction. Indeed, before respondent acted, the closing appeared to be falling apart. Respondent was able to convince all concerned, including two real estate attorneys, that the closing should move forward. More importantly, respondent was the only individual to leave the closing with funds that day: a check for $125,000 drafted by the Ketchows' attorney and another for $25,000 drafted by Kreisbuch. Indeed, it was respondent who told the Ketchows' attorney to make the $125,00 check payable to Reynolds. If, as respondent argued, his role in the transaction was that of an accountant only, he had an affirmative duty to advise grievant of the limited nature of his involvement. Moreover, prudence dictated that such a notice should have been reduced to writing.

Telling were respondent's several admissions, re-characterized at the DEC hearing, that he had acted as Reynolds' attorney during

the Middletown closing.

The Board found no evidence that respondent affirmatively limited his representation as a CPA and concluded from the record that he acted as grievant's attorney in the matter. As such, he impermissibly engaged in a conflict of interest situation by simultaneously representing grievant and Reynolds, who had competing interests. As noted earlier, respondent admitted in the malpractice suit that he was acting as Reynolds attorney when he agreed to escrow $14,900 in Reynolds' behalf. Yet he never disclosed to grievant that he also represented Reynolds in any capacity and he never obtained grievant's consent to the representation. In fact, such dual representation would most likely been impermissible even if respondent had obtained a waiver to the conflict. Grievant's and Reynold's interests in the transaction were so adverse that it would have been impossible for respondent to represent both with undivided loyalty. Indeed, respondent favored Reynolds over grievant when he turned over the proceeds of the Middletown property to Reynolds. Respondent's conduct in this regard violated RPC 1.7.

In addition, respondent completely failed to safeguard grievant's funds, in violation of RPC 1.15. In fact, respondent left the Middletown closing with all of grievant's money. A search of the record reveals no documentary evidence or testimony that would authorize or justify respondent's delivery of the Middletown

proceeds to Reynolds. Respondent's bold assertion that he had not been specifically told to hold those funds in escrow cannot be seriously considered. It is a matter of elementary law that respondent had a duty to protect grievant's funds until grievant received deeds to the Hoboken properties or instructed respondent to disburse the funds. That duty was heightened considerably by respondent's knowledge, via his representation of Reynolds, that the IRS had imposed liens on Reynolds' property, which by necessity included the Hoboken properties. Indeed, the Board would have found a violation of RPC 1.15 in this matter even in the absence of an attorney-client relationship with grievant. See In re Perez 104 N.J. 316, 323 (1986), citing In re Lambert, 79 N.J. 74, 77 (1979) where the Court found that an attorney's professional obligations "reach[] all persons who have reason to rely on him even though not strictly clients." There is no question that grievant had every right to expect respondent to safeguard the Middletown proceeds, as respondent guided him through the complexities of the IRS code and the "swap transaction" that he had recommended to grievant in the first place.

Respondent lacked the fundamental good sense required of all attorneys to protect client funds, choosing instead to hide behind the doubtful and unproven "requirement" in the IRS code that, if he is to be believed, virtually required him to turn the funds over to Reynolds when he did. The Board found respondent's sophistry to be

hopelessly flawed and his misconduct in this regard to be in violation of RPC 1.1(a)as well.

There is also the issue of respondent's fees. Although the DEC was convinced that respondent took his fees without grievant's knowledge or consent, grievant's recollection is not clear on the issue. Although, grievant did not recall authorizing respondent to take his fee from the escrowed funds, he did not deny having given the authorization either. Several times during his testimony, grievant noted that he could not recall some aspects of the case because many years had passed since the events. One such instance occurred when grievant was asked about how respondent was to be paid his fee.

For these reasons, the Board was unable to find clear and convincing evidence that respondent engaged in any misconduct regarding the removal of his fees from the $25,000 escrow. Therefore the Board dismissed the charge of a violation of RPC 1.15 in this context. The Board also dismissed the charges of violations of both RPC 1.8 (prohibited transactions) and RPC 1.9 (conflict of interest, former client) as inapplicable.

Parenthetically, another important issue in this case that was not a part of the record below: the possibility of a knowing misappropriation. Grievant testified that respondent assured him that he would hold the $125,000 proceeds in his trust account pending a closing on the Hoboken properties. On the other hand,

respondent disclaimed any knowledge of an escrow arrangement beyond Kreisbuch's alleged request that respondent deposit the $25,000 check in his trust account, give $14,900 of that sum to Reynolds and escrow the remainder. If it had been established that respondent was to hold all of the proceeds in escrow, as grievant alleged, and that respondent released them to Reynolds knowing that Reynolds was not entitled to them, respondent could have been found guilty of knowing misappropriation. Under In re Wilson, 81 N.J. 451 (1979) and In re Hollendoner, 102 N.J. 21 (1985), the unauthorized use of attorney trust account funds need not be for the attorney's personal benefit to be deemed a knowing misappropriation. The unauthorized use can be for another, in this case, Reynolds. On this record, however, the Board was unable to find enough evidence that either an escrow agreement existed or that respondent misappropriated funds in Reynolds' behalf.

The misconduct in this matter was serious. The economic and emotional harm to grievant was staggering. He lost his life's savings after crossing paths with respondent, only to be tormented by the IRS for years to come. However, grievant eventually received a substantial settlement from his real estate attorney and respondent in the malpractice action. It appears that he was made whole. Nevertheless, respondent's total lack of appreciation and contrition for the role he played in grievant's loss was inexplicable. Respondent's refusal to acknowledge any wrongdoing

and to express any remorse for his actions was disturbing. Under In re Berkowitz, 136 N.J. 134(1994), absent egregious circumstances to the client or serious economic injury, a reprimand is ordinarily adequate discipline in a conflict of interest case. This is not an ordinary case, however. The great harm to grievant that accompanied respondent's actions and respondent's unwavering denial of wrongdoing led the Board to unanimously impose a six-month suspension. The Board also noted that the discipline would have been greater without the passage of time (almost ten years) since respondent's infraction.

The Board also required respondent to complete twelve hours of professional responsibility within one year following his reinstatement.

The Board further required that respondent reimburse the Disciplinary Oversight Committee for appropriate administrative costs.

Dated: 2/17/98

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD VOTING RECORD

In the Matter of Anthony Feranda
Docket No. DRB 97-270

Argued: October 16, 1997

Decided: February 17, 1998

Disposition: Six-Month Suspension

Members	Disbar	Six-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Zazzali		x					
Brody		x					
Cole		x					
Lolla		x					
Maudsley		x					
Peterson		x					
Schwartz		x					
Thompson		x					
Total:		9					

Robyn M. Hill 3/10/98
Robyn M. Hill
Chief Counsel